

Decision 02-12-018 12/05/02

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company
(U 39 M) for Section 851 Approval of Agreements
Allowing Access to Electric Distribution Facilities
for the Installation and Maintenance of
Telecommunications Equipment.

Application 00-12-026
(Filed December 19, 2000)

**OPINION ADDRESSING THIRTEEN AGREEMENTS
FOR THE LEASE OF PROPERTY
OWNED BY PACIFIC GAS AND ELECTRIC COMPANY**

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I. Summary

In Application (A.) 00-12-026, Pacific Gas and Electric Company (PG&E) requests authority under Public Utilities Code § 851¹ to convert 13 license agreements into lease agreements. The agreements establish terms and conditions for the installation of telecommunications equipment on PG&E's utility poles and other electric distribution facilities. Today's decision finds that the "lease" agreements are in substance licenses consistent with the Commission's General Order (G.O.) 69-C. Accordingly, this decision does not approve a conversion of those agreements, because application and approval of lease authority under Section 851 is not required.

II. The Application

PG&E refers to the 13 agreements which are the subject of this Application as "Master Agreements." Each Master Agreement allows PG&E to grant both a license and a lease under its terms and conditions.² PG&E states that the benefit of a license is *immediate* access to its facilities. A lease would require prior Commission approval under Section 851. Pursuant to G.O. 69-C, PG&E may grant a license to install telecommunications equipment on its electric distribution facilities without Commission approval. A license granted pursuant to G.O. 69-C must be: 1) for limited uses; 2) revocable either upon order of the Commission or upon the utility's own determination that it is desirable or necessary in the interest of service to its patrons and customers and 3) not interfere with the utility's (PG&E) operations, practices or service to customers.

¹ Unless otherwise indicated, all statutory references are to the Public Utilities Code.

² Section 2.1 pertains to the grant of a license. Section 2.2 pertains to a lease.

PG&E states that the benefit of converting a license to a lease is long-term, uninterrupted access to its facilities. Any equipment previously installed under a G.O. 69-C license will automatically become subject to a lease upon conversion. The Master Agreements state that the conversion of the Agreements into leases will not become effective absent Commission approval. The duration of a Master Agreements as a license, lease, or combination of the two is five years, with a one-time renewal option for an additional five years.

The Master Agreements govern the installation of telecommunications equipment on PG&E's electric distribution facilities located anywhere in PG&E's service territory. The agreements are for poles and underground facilities with no supply circuits in excess of 50kV. Once a site is identified, PG&E determines if the equipment can be installed safely and without harm to its electric distribution system. The Agreements limit the installation of equipment to only those PG&E facilities that (1) have unused space, and (2) are located within PG&E's existing rights-of-way. The Agreements also provide that the equipment be installed and maintained in accordance with all applicable laws and regulations, including G.O. 95 and G.O. 128.³

The Master Agreements allow PG&E to reclaim space if PG&E needs the space to provide utility service. If space is reclaimed, the Agreements require PG&E to make a good faith effort to provide alternate space by rearranging existing facilities or adding new facilities. If this is not possible, the space will simply be lost.

³ G.O. 95 specifies standards for the construction, maintenance, operation, and use of overhead electrical and communications facilities. G.O. 128 does the same for underground facilities.

The Master Agreements also require that PG&E be reimbursed for any costs incurred by PG&E associated with the installations. The Agreements also require the payment of various fees to PG&E. The fees include mapping and engineering fees, as well as a fee for each attachment.⁴ The Master Agreements also require payment of a one-time \$10,000 fee to PG&E for the filing of an application to convert the license agreements into lease agreements.⁵ In addition, the Agreements require PG&E to request authority from the Commission for an unlimited number of installations under the Agreements without the need for additional filings. If the Commission denies the request, each subsequent filing requires a \$5,000 payment to PG&E. PG&E states that all fees will be credited “above the line” to electric ratepayers for general rate case purposes.

In A.00-12-026, PG&E requests authority to make the following “insubstantial amendments” to the Master Agreements without having to file a new application:

⁴ The Agreements define “attachment” as a single contact on a pole to accommodate or support a single cable or piece of equipment and, with respect to underground facilities, the installation of one cable within a conduit or inner duct.

⁵ Master Agreements, Section 8.5.

- Installations and removals of equipment that are made in accordance with the provisions of the Master Agreements.
- One-time renewals of Master Agreements that are made in accordance with Section 2.5 of the Agreements.
- Reductions in the duration of the Master Agreements.
- Revisions in the amount of the fees paid to PG&E that are made in accordance with (i) the Master Agreements, and (ii) the rules, regulations, or orders of the Commission or a court of law.
- Assignments of the Master Agreements.
- Other insubstantial amendments agreed to by the parties.

PG&E states that prior Commission approval of insubstantial amendments will avoid unnecessary expenditures of resources by the Commission, PG&E, and other parties.

As to nine of the Master Agreements, PG&E believes that it is unnecessary for the Commission to conduct an environmental review. This is because each of the nine carriers that are parties to Master Agreements obtained its CPCN in a proceeding where the Commission adopted a mitigated negative declaration regarding the activities authorized by the carrier's CPCN. PG&E states the mitigated negative declarations encompass the types of activities that will occur under the Agreements, since the Agreements are specifically limited to activities that (1) are covered by the carriers' CPCNs, and (2) conform with all applicable laws, including Commission orders.

PG&E offers several reasons why it is in the public interest for the Commission to authorize the conversion of the Master Agreements into Section 851 leases. First, the Agreements are consistent with the Commission's policy of favoring the use of existing utility facilities for the development of telecommunications infrastructure. Second, the Agreements are structured to

prevent the use of facilities from interfering with PG&E's electric operations or public utility services. Third, the Agreements benefit carriers by enabling them to expand and improve their service using existing utility facilities. Fourth, the fees paid will benefit PG&E's electric ratepayers. Fifth, the Agreements are consistent with Commission rules governing access to utility rights-of-way (ROW) by telecommunication companies that were adopted in Decision (D.) 98-10-058, as modified by D.00-03-055 (ROW decisions). Finally, the Agreements will not have an adverse effect on the environment, since any installation of equipment by a carrier must comply with the carrier's mitigated negative declaration.

III. Protest and Response

A protest to A.00-12-026 was jointly filed by AT&T Communication of California, Inc., XO California, Inc., and the California Cable Television Association (collectively, "Protestants"). The Protestants argue that it is improper for PG&E to seek Commission approval of the Master Agreements pursuant to Section 851. Section 851 states, in relevant part, as follows:

No public utility...shall...lease...any part of its...plant, system or other property **necessary or useful** in the performance of its duties to the public...without first having secured from the commission an order authorizing it to do so. (Emphasis added.)

The Protestants contend that Section 851 does not apply to the Master Agreements, since the Agreements do not allow the carriers to install equipment in space that is necessary or useful to PG&E.

The Protestants next argue that the Master Agreements are licenses that are subject to G.O. 69-C, and such licenses do not require Commission approval under Section 851. G.O. 69-C states, in relevant part, as follows:

[P]ublic utilities...are...authorized to grant...licenses...for use [of their property]...**without further special authorization by this Commission** whenever it shall appear that the exercise of such...license...will not interfere with the operations...of such public utilities...provided, however, that **each such grant...shall be made conditional on the right of the grantor...to commence or resume use of the property in question whenever, in the interest of its service to its patrons or consumers, it shall appear necessary or desirable to do so.** (Emphasis added.)

The Protestants assert that there are two key criteria for determining when an agreement is a license that is subject to G.O. 69-C. First, the agreement must be limited to the use of utility property that is not necessary or useful in the performance of the utility's duties to the public. The Protestants believe that the Master Agreements satisfy this criterion for the reasons stated in the previous paragraph. Second, the utility must be able to terminate the agreement at will. The Protestants contend that the Master Agreements satisfy this criterion because Sections 7.1 and 7.3 of the Agreements allow PG&E to terminate the Agreements at will. The Protestants also contend that the Master Agreements are licenses because of their similarity to G.O. 69-C license agreements in Advice Letter (AL) 2063-E that PG&E filed at the Commission on December 20, 2000.

The Protestants argue that the Master Agreements contain unreasonable fees, including (1) a one-time charge of \$10,000 to file A.00-12-026, (2) a \$5,000 fee for each additional filing, and (3) attachment, engineering, and rearrangement fees that exceed PG&E's costs in contravention of the ROW decisions. The Protestants believe that PG&E's motive for filing A.00-12-026 is to have the Commission ratify the unreasonable fees. The Protestants are concerned that PG&E's attempt to extract unreasonable fees will, if approved, encourage PG&E and other utilities to extract unreasonable fees in the future.

The Protestants note that PG&E has an affiliate engaged in telecommunications-related activities.⁶ The Protestants contend that PG&E is attempting to hinder the affiliate's competitors by making the competitors' access to PG&E's facilities more difficult and expensive. The Protestants also contend that granting A.00-12-026 would create a precedent that allows "incumbent pole owners" to attach equipment to their poles without any Commission review, while competitors must incur the costs and delays associated with § 851. The Protestants argue that such a result would violate the Telecommunications Act of 1996 by imposing requirements that are not competitively neutral.

PG&E denies the Protestants' accusation that it is attempting to make access to its facilities more difficult and expensive. PG&E also disputes the Protestants' claim that the Master Agreements are G.O. 69-C licenses because PG&E can terminate the Agreements at will. PG&E states that Article X of the Agreements provides that once the Commission has approved the Agreements as Section 851 leases, PG&E may terminate the Agreements only under the following circumstances: (1) material breach; (2) failure of a carrier to maintain its CPCN; (3) assignment without consent; (4) failure of the attaching carrier to obtain permission from underlying land owners, which results in legal proceedings; and (5) written mutual agreement.

IV. Discussion

A. License vs. Lease

A threshold issue is whether the conversion of the Master Agreements into "leases" creates genuine lease agreements or whether the Agreements in question

⁶ In AL 2276-G/2054-G, dated November 14, 2000, PG&E notified the Commission that it had

Footnote continued on next page.

are in fact consistent with G.O. 69-C licenses, both before and after the proposed conversion.

We find that the Master Agreements do not create genuine leases, and therefore cannot be converted into such. The Master Agreements remain in effect, as they have since they were entered into, as licenses. As described below, the Agreements appear to be for limited use in that they authorize only the installation of minor telecommunications equipment on existing electric distribution facilities, the Agreements can be revoked by PG&E consistent with G.O.69-C, the telecommunications equipment can be easily removed from PG&E's facilities, and the telecommunications equipment will not interfere with PG&E's utility operations, practices or service.

Section 2.1 of the Master Agreements declares the rights granted therein as those of a license. A "license" is generally defined as an agreement that confers a right to occupy, while a "lease" is an agreement that confers exclusive possession.⁷ The reference in Section 2.2 of the Master Agreements to a "lease" is not dispositive. The use of "lease" language is inconclusive as to a party's intentions to establish a lease.⁸ Section 2.2 also goes on to state that the use of the facilities under a Master Agreement continues pursuant to its terms and conditions. All installations that were made pursuant to the G.O. 69-C licenses automatically become subject to the "leases" upon conversion.

In addition, the converted Master Agreements do not convey an interest in real property. Section 1.2 of the Master Agreements states that PG&E "does not

created an affiliate called PG&E Telecom, LLC.

⁷ Qualls v. Lake Berryessa Enterprises, Inc. (1999) 76 C.A.4th 1277, 1284.

⁸ Beckett v. City of Paris Dry Goods Co. (1939) 14 C.2d 633.

convey any interest in real property.” A license does not create an interest in the land of the licensor.⁹

Lastly, the rights granted in the Master Agreements are subject to termination by PG&E under the same terms and conditions as contained in G.O. 69-C.¹⁰ Section 10.1(b)(4) of the Master Agreements allows termination “in accordance with the provisions of Section 2.1, if PG&E or the CPUC invoke the provisions of G.O. 69-C.” Section 7.1 also states that “PG&E shall be entitled at any time to discontinue PG&E’s use of PG&E’s facilities located on the PG&E Right-of-Way, and Permittee shall immediately remove its Attachments.”

Additionally, Section 7.3 allows PG&E to revoke the privileges granted under the Master Agreement immediately and for the same reasons, as provided by G.O. 69-C. Section 7.3 provides that if

(i) PG&E needs the space or capacity occupied by the Permittee’s equipment for its own use, or (ii) should any Pole to which Permittee has attached an Attachment be taken by the power of eminent domain, then on being given at least ninety (90) days’ written notice by PG&E to do so, or in cases of emergency on such notice less than ninety (90) days as the circumstances reasonably permit (which emergency circumstances may include no notice), the Permittee shall remove its Attachments from the PG&E poles as PG&E shall designate and at the expiration of the time specified in the notice all rights and privileges of the Permittee in and to the PG&E poles designated shall terminate.

⁹ Johnson v. Kenneth I. Mullen, Inc. (1989) 211 C.A.3d 653, 657; Nahas v. Local 905, Retail Clerks Assn. (1956) 144 C.A.2d 808, 821.

¹⁰ Apart from G.O. 69-C requirements, the fact that an agreement is not terminable at will does not destroy its character as a license or convert it into a lease. Qualls v. Lake Berryessa Enterprises, Inc. (1999) 76 C.A.4th 1277, 1284.

A notice requirement does not change the legal nature of the right to attach to PG&E's poles. Advice Letter 2063-E filed by PG&E on December 20, 2000 contains three G.O. 69-C license agreements. These agreements provide for the exact same notice requirements as the Master Agreements herein. Each of the agreements allows a carrier to attach its equipment to PG&E's facilities; none of these agreements requires the licensee to pay any fees associated with Section 851.

We also do not find any apparent benefit to telephone carriers in the Master Agreements which warrants or necessitates an additional one time \$10,000 fee and a \$5,000 fee for each additional application. As Protestants fear, such fees would artificially inflate the costs of competing telephone carriers and undermine our policy objectives in the telecommunications sector. While the revenue from the proposed additional fees could benefit PG&E customers, as it argues, the unreasonableness of the fees outweighs any benefits.

For these reasons, we reject PG&E's assertions and find that Master Agreements do not create genuine leases; nor do they produce any additional benefits to Permittees that is commensurate to the added costs in fees and process. The Master Agreements are in substance licenses authorized by G.O. 69-C.

B. Public Utilities Code § 851

For the above stated reasons, we find that the Agreements in question are properly license agreements consistent with the terms of G.O. 69-C. Because the Master Agreements do not create genuine leases, Section 851 review and approval is not necessary.

Additionally, because no Section 851 approval is required in this instance, a review by the Commission under CEQA is also unnecessary. There is no discretionary decision by the Commission which triggers CEQA.

C. Compliance with Section 851 and CEQA

We have expressed concern in recent decisions that utilities might instigate transactions and activities under G.O. 69-C in order to evade the advance review and approval requirements of Section 851 and CEQA.¹¹ We have carefully reviewed the Master Agreements and find that the Agreements do not circumvent Section 851 or CEQA. This is because the Agreements properly grant G.O. 69-C licenses for the use of PG&E's facilities.

However, we remain concerned that utilities might attempt to use G.O. 69-C to circumvent Section 851 and CEQA. We caution utilities that any use of G.O. 69-C to evade Section 851 and CEQA will be subject to monetary penalties and other sanctions.

V. Procedural Matters

In Resolution ALJ 176-3053, dated December 21, 2000, the Commission preliminarily determined that this proceeding should be categorized as ratesetting, and that hearings were not necessary. PG&E and the Protestants subsequently filed written statements in which they declared that hearings were not necessary. Based on the record in this proceeding, we affirm and finalize the preliminary determinations contained in Resolution ALJ 176-3053.

¹¹ D.01-12-023, *mimeo.*, p. 2; D.01-12-022, *mimeo.*, p. 2; D.01-11-063, *mimeo.*, p. 6; D.01-06-059, *mimeo.*, pp. 7-8; D.01-03-064, *mimeo.*, pp. 7-12; and D.00-12-006, *mimeo.*, pp. 6-7.

VI. Comments

The draft alternate decision of Commissioner Duque was mailed on August 15, 2002, pursuant to Rule 77.6. Comments in support of the draft alternate decision were filed by CCTA on August 26, 2002 and are incorporate herein.

Findings of Fact

1. In each of the Master Agreements addressed by this decision, PG&E grants a license pursuant to G.O. 69-C to install telecommunications equipment on PG&E's electric distribution facilities.

2. The Master Agreements, Section 2.5, provide that the use of the facilities whether under a license, the "lease" or combination thereof, continues for five years with an option to renew for one additional five year term.

3. The Master Agreements, Section 1.2, state that no interest in real property is conveyed by PG&E.

4. The Master Agreements state that PG&E will determine if the equipment can be installed safely and without adversely affecting its electric distribution system. The Agreements limit the equipment to those PG&E facilities that (i) have unused space, and (ii) are located within utility rights-of-way. The Master Agreements allow PG&E to reclaim space if PG&E needs the space to provide utility service.

5. The Master Agreements require that PG&E be reimbursed for any costs it incurs in connection with the installations.

6. The Master Agreements require that the equipment be installed and maintained in conformity with all applicable laws, rules, and regulations.

7. The Master Agreements are structured to prevent the use of facilities from interfering with PG&E's operations or adversely affecting service to PG&E's customers.

8. The Master Agreements allow PG&E to revoke the privileges granted therein under the same conditions contained in G.O. 69-C.

9. Section 7.1 of the Master Agreements states that a carrier must remove its equipment from a PG&E facility whenever PG&E terminates its use of the facility.

10. Section 7.3 of the Master Agreements allows PG&E to reclaim space from a carrier after providing 90 days' notice.

11. The Master Agreements, Section 10.1(b)(4), also allow for termination if PG&E or the CPUC invoke the provisions of G.O. 69-C.

12. Today's decision does not implement regulatory changes; it addresses a routine application for approval of lease agreements pursuant to Section 851.

13. Today's decision does not hinder the deployment of advanced services and technologies.

14. Advice Letter 2063-E filed by PG&E on December 20, 2000, contains three G.O. 69-C license agreements. Each of the agreements allows a carrier to attach its equipment to PG&E's facilities; none of these agreements requires the licensee to pay any fees associated with Section 851. The agreements provide for the exact same notice requirements as the Master Agreements herein.

15. There is no apparent benefit to telephone carriers in the Master Agreements that warrants or necessitates an additional one time \$10,000 fee and a \$5,000 fee for each additional application.

16. The Commission has expressed concern in recent decisions that utilities might use G.O. 69-C to circumvent the advance review and approval requirements of Section 851 and CEQA.

Conclusions of Law

1. A license is generally defined as an agreement that confers a privilege to occupy, while a lease is an agreement that confers exclusive possession.

2. G.O. 69-C provides utilities with authority to grant licenses for the certain uses of their facilities. A utility may terminate a license granted pursuant to G.O. 69-C whenever it appears necessary or desirable to do so.

3. A license would not convey an interest in land.

4. Pursuant to Section 1.2, the Master Agreements do not convey an interest in the real property of PG&E.

5. The Master Agreements can be revoked by PG&E at will consistent with the terms of G.O. 69-C, the telecommunications equipment can be easily removed from PG&E's facilities, and the telecommunications equipment will not interfere with PG&E's utility operations and service. The Agreements merely provide the permission to act on the property of another and convey no interest in the property itself.

6. The Agreements in question do not create a "lease" interest and instead are property characterized as licenses.

7. Because the Agreements are not leases, an application for authority under Section 851 is not required.

8. Today's decision does not harm competition by forcing competitors that seek to install equipment on PG&E's facilities to incur the costs and delays associated with Section 851.

9. The Master Agreements do not circumvent Section 851 or CEQA.

O R D E R

IT IS ORDERED that:

1. Application 00-12-26 is denied.
2. The protest of A.00-12-026 is granted.

This order is effective today.

Dated December 5, 2002, at San Francisco, California.

HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

President Loretta M. Lynch,
being necessarily absent, did
not participate.